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No. 84-1550

In The

SUPREME COURT OF THE UNITED STATES

October Term - 1984

ARTHUR A. SMITH and MICHAEL J. LOPEZ, individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,

Petitioners,

-vs-

GOLDEN WEST BROADCASTERS, INC., a California Corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,

Respondents.

PETITIONERS' REPLY BRIEF

JACQUE BOYLE
Crocker Center - Suite 4220
333 South Grand Avenue
Los Angeles, California 90071

(213) 622-7116

Attorney for Petitioners

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PETITIONERS' REPLY BRIEF

Defendants do not address the compelling issue presented by this case.

We here ask this Court to review the Constitutionally sanctioned qualified privilege of the media to defame and to invade one's privacy, and the resulting erosion of the equally viable rights of the individual to be secure in his reputation, to enjoy his privacy, and to pursue a lawful occupation.

We ask this Court to affirm that such individual rights are protected by the Constitution of the United States[1], and may not be lost by the media's wrongful assault upon one's reputation or

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[1]Article 1, §1 of the California Constitution generally enumerates such rights: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

unwarranted intrusion into one's private life.

Defendants' begin their brief by a mild characterization of the broadcast involved in this action. However, they misstate the content of the Moneywatch segment at issue. It is not true that the broadcast showed "the special photographic skill and equipment which Petitioners used to provide their services." To the contrary, those special skills, as well as a detailed description of the equipment and services involved, were deleted from the taped interview of plaintiffs used in the actual broadcast.[2]

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[2] "...[I]n the taped interview, I discussed the costs of our services and the cost factors that were involved in our service, with Stan Chambers. ...However, my interview, as broadcast, was edited to cut out all of my discussion relative to the charges for our services and the factors that went into the costs of each job..." (Plaintiff Smith's Declaration, CT 207-208). See also, Footnote 6, ante.

Defendants' reliance on Rollenhagen v. City of Orange, (1981) 116 Cal.App.3d 414, is based upon the Trial Court's reference to that case in its Minute Order preceding the Summary Judgment. But that reference, and the Rollenhagen holding, were omitted from the Order granting Summary Adjudication. The Summary Adjudication, and therefore the Summary Judgment, rested solely on the Trial Court's holding that the broadcast was "...a statement of opinion protected from liability by the United States and California Constitutions." (Appendix, Petition, pg 5)

Nevertheless, Rollenhagen is not relevant to this case. Rollenhagen concerns the application of a qualified privilege, derived from California Civil Code Section 47, subdivision 3.[3]

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[3] "A privileged publication or broadcast is one made--...3. In a communication, without malice, to a person interested

And in Rollenhagen, plaintiff was the subject of an on-going news story, involving his arrest. The broadcast of that case, including the taped interviews of Mr. Rollenhagen and his alleged victim, was termed a "substantially accurate reports of the police proceeding against plaintiff".[4] It was further held to involve a matter of specific public interest,[5] all foreign to the facts of this case.

In any event, that State conditional privilege also requires an absence of malice for its application. Here, there

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[3] (Con't) therein, (1) by one who is also interested..." Civil Code, §47 (3).

[4] Noted as privileged under California Civil Code §47 (4)

[5] Rollenhagen did not overrule Rancho La Costa, Inc. v. Superior Court (1980) 106 C.A.3d 646; 165 C.R. 347, holding: "The State conditional privilege of section 47(3) does not apply to a publication by a magazine or newspaper merely because it relates to a matter which may have general public interest." (@ 664)

was no ruling on, or even any consideration of, the issue of malice by the Trial Court. Any study of that issue would have required its resolution in plaintiffs' favor. No other conclusion could be drawn from the deliberate conduct of the defendants in deleting from the broadcast the portion of the plaintiffs' taped interview that discussed the factors involved in determining the fee[6] to be charged plaintiffs' customers, particularly in view of defendants relentless criticism of that fee.

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[6] "In the interview itself, I recall specifically that Arthur Smith stated, on camera, that the $105.00 basic price included the duplication of 36 slides, and the detailed itemization of the articles photographs...recordation of serial numbers...and indefinite storage of duplicate slides and inventory...[It] would take [us] approximately one-half day...[E]very bit of the interview that had references to costs of our services and the factors that went into costs and all of Arthur Smith's discussions relative to such pricing, had been cut out...[including] our expertise..." (Lopez Declaration, CT 214-215).

I. BROADCAST NOT CONSTITUTIONALLY PROTECTED LAY OPINION AFFORDING DEFENDANTS BLANKET IMMUNITY FOR ALL TORTS INVOLVED.

A. Summary Judgment improper in Defamation Causes of Action.

The only quarrel we have with defendants' citation from Gertz v. Welch, (1974) 418 U.S. 323, at page 3 of their Brief, is this Court's interchangeable use the words "idea" and "opinion". We do not believe this Court thereby intended to sanction publications that defame, or demean, simply because they are labeled "opinion", or are couched in terms that may be argued as such, as in the case at bar.

Plaintiffs' unique service business and their efforts to earn their livelihood by that enterprise, were lost as a result of the defendants' defamation, labeled "opinion", in a clear abuse of

First Amendment rights. Such abuse was particularly unjust here, as plaintiffs had no access to the public, and no forum from which to respond to defendants' unwarranted attacks upon them.

Defendants further suggest that their broadcast, because it was not a technical or trade publication, was therefore privileged. They cite Slaughter v. Friedman, (1982) 32 Cal. App.2d 149; 185 C.R. 244. That case held a publication to be defamatory by its accusation that plaintiff was charging "excessive fees", but suggested a similar statement by a layman "might indeed constitute mere opinion". But this broadcast did not involve any "layman's" statements. Larry McCormick, the announcer who falsely impugned plaintiffs' integrity and business activities, was not a "layman". He was a professional journalist, a renowned, even

famous, news anchorman, whose statements would be generally well received by his viewers.

The tenor of this broadcast inferred, and even revealed, an examination and study by KTLA and its staff, of the businesses and/or individuals that they undertook to promote or criticize. They would stand in the public eye as being much more knowledgeable, and having available much greater resources for investigation and study, than any layman engaging in a similar monologue. Even the size, stature and authority of the television station, gave an aura of authenticity to their broadcast.

Relevant here, is the pervasive influence and ever-expanding power of the media. One need look no further than the recent TWA-hostage crisis, to note the ability of the media to influence, manage, and even manipulate the news and

the events that create news, to appreciate that tremendous media power. Here, defendants misused that power to defame and ridicule the plaintiffs.

Defendants further suggest that their recitation of innocuous statements in the broadcast, and the use of selective phrases, such as, "what we consider", and "some good advice anytime", converts their otherwise defamatory and demeaning broadcast into one of media "opinion", protected by the United States Constitution.

We submit that this Court has never so held. And the California Supreme Court in Gregory v. McDonnell Douglas, (1976) 13 C.3d 596, repudiated such an approach:

> "The legal effect of attacks on motives [attributed to a public official or an active participant in a heated labor dispute] must be carefully distinguished, however,

> from accusations that an individual has committed a crime or is personally dishonest. No First Amendment protection, of course, enfolds the latter charges [Citations]." (Emphasis added)
>
> @ 604

Here, the subject broadcast inferred price gouging and personal dishonesty, as well as impugning plaintiffs' expertise as photographers.

Nor are defendants' references to a critic's unflattering review of a motion picture, in point. A book, picture, play, film, or artistic endeavor of any type, is always subject to, invites, and sometimes even thrives on, artistic analysis and disfavor. The public at large expects such criticism and puts it in mild perspective. Artistic review is not even remotely related to the broadcast of this case, where private

citizens' professional and personal reputations have been irreparably damaged, their business lost, and their privacy invaded, from an abuse of media power.

It should be stressed again, that plaintiffs did not garner any public interest in their activities. They had no standing or status as public officials or public figures, and were not involved in any matter of public concern or public importance. They were not participants, or even spectators, in any on-going news story or event. They were not involved in any public issue and were not "news-worthy" in any sense of that word.[7]

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[7] Plaintiffs sent out approximately 250 press releases explaining and extolling their prospective service business, to virtually the entire local media and much of the National media. No Radio or Television station or newspaper responded to that press release, except defendants, for their malicious purposes here at bar. The only other response came from an obscure periodical, accomodating with an innocuous comment mentioning plaintiffs' business (Lopez Declaration, CT 211-212).

None of the respondents' citations involve defamation or invasion of privacy of private individuals who were not engaged in any public issue or in any matter of public interest. As this Court has held in its very recent decision of Dunn & Bradstreet v. Greenmoss Buildings Inc. No. 83-18, (1985) ___U.S.___ such absence of any public issue warrants a finding that the publication does "...not qualify for Gertz-style constitutional protection...". That holding is particularly pertinent to this case.

II. INVASION OF PRIVACY COUNT IMPROPERLY IGNORED AND NOT SUBJECT TO SUMMARY JUDGMENT.

Plaintiffs' Invasion of Privacy Causes of action were not addressed in any manner by the Trial Court, and is only peripherally noted in the Defendants' brief. Their "Conclusion"

inaccurately states that the plaintiffs "consented to the interview, but were unhappy with the opinion expressed" and that "No promises were alleged or made."

While plaintiffs may have solicited publicity by their press release, they did not consent[8] to the interview inasmuch as their participation in that interview was obtained by fraud.[9] Consent so obtained is universally deemed to be void as to the wrongdoer (Depner v. Joseph Zukin Blouses, (1936) 13 C.A.2d 124). And it is not true that no promises[10] were alleged or made by the

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[8] "An apparent consent is not real or free when obtained through fraud." California Civil Code, §1567.

[9] "Q. [Before the plaintiffs' interview]...did you have in mind that you were going to have a program that was going to be critical of charges that he was giving you? A. Yes. Q. Did you tell him that? A. No." (Rothbart's Deposition, CT 178).

[10] Fraud always includes concealment of material facts or a promise made without any intention to perform. California Civil Code, §1709, §1710 (3), (4).

defendants. To the contrary, defendants always stated that the plaintiffs would get good publicity from the interview[11] and defendants even admitted that they knew that the plaintiffs would not have consented to the interview if they had known that it would be edited and used in a broadcast to unfairly and falsely impugn their business and their integrity.[12]

Invasion of Privacy does not depend upon the existance of actionable defamation. The loss of plaintiffs'

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[11] "Stan Chambers...told me that this interview would be good exposure and good publicity for us and for the business." (Smith Declaration, CT 206)

[12] "Q. ...Did you have any belief that if you told Mr. Lopez that you were going to have a program critical of his cost, that he would not consent to the interview? ...A. Yes." (Rothbart Deposition, CT 179). "Q. Did you have a belief at that time that the plaintiffs expected to get favorable publicity out of your program? A. Yes. "Q. ...prior to the time it went on the air? A. Yes." (Rothbart Deposition, CT 190). See also, footnote 10.

cause of action for invasion of their privacy, by summary judgment of this case, was unwarranted. Plaintiffs were denied due process of law, in that the invasion of privacy count was not even considered by the trial Court in its Order for Summary Adjudication and its Summary Judgment.

In any event, the summary judgment was based upon the trial Court's erroneous determination that the broadcast was a media opinion protected by the First Amendment. The application of that determination to an invasion of privacy cause of action is clear error under California authority:

> "[T]he right of privacy is paramount to the right of free speech when, in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech

guaranteed by the state and federal Constitutions does not permit violation of the right of privacy."

Rancho La Costa v. Superior Court. supra @ 667

III. SUMMARY JUDGMENT AS TO INTERFERENCE WITH ECONOMIC ADVANTAGE UNWARRANTED AND AGAINST LAW.

The Trial Court did not even address plaintiffs cause of action for Interference with Economic Advantage in any context whatsoever, either in its Minute Order, Order Granting Summary Judgment, or in the Summary Judgment itself. The Trial Court may have decided that this cause of action might fall with the principal cause of action, but they did not so state. To the contrary, the Court specifically avoided the determination of any other issue in its ruling on the Motion for Summary Judgment (Petition, Appendix A, pg 3, lns 4-5).

Defendants' interference with

plaintiffs' right to conduct their lawful business was a further denial of plaintiffs' Constitutional right to earn their living.[13]

CONCLUSION

The media of this day, and particularly Television, wields awesome influence over individuals and events, and therefore, has awesome power. But such power should always be exercised with responsibility and restraint. As Lord Acton observed, in his oft quoted letter to the Archbishop of Canterbury, "Power corrupts and absolute power corrupts absolutely".

The abuse of media power has led to a steady erosion of individual rights, and defendants' misuse of that power here has caused irreparable damage to the plaintiffs.

The right of privacy is both a

[13] DeJong v. Oregon, (1937) 299 U.S. 353; Getlow v. New York, (1925) 268 U.S. 652;

property right and part of one's liberty, guaranteed by the Fifth and Fourteenth Amendments, as are the rights of a person to be secure in his reputation and to earn his living.

We therefore ask this Court to affirm that every person has the right to be secure in his reputation, to enjoy his privacy and to pursue a lawful occupation, and that such rights are protected by the Constitution of the United States.

And we ask this Court to hold that:

One is liable for what he infers, as well as what he directly states.[14]

A media publication that defames, demeans or ridicules a private person is not protected by the First Amendment, merely because it is labeled opinion, or is couched in terms that it may be argued as such. Here, the media broad-

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[14] Newbury v. Times, (1916) 173 C. 387; Maher v. Devlin (1928) 208 C. 270.

cast, by clear inference, libeled the plaintiffs. At least a jury could have so found. Summary Judgment was therefore a denial of plaintiffs' Constitutional rights to due process.

The First Amendment does not protect media opinion, or any publication that invades the privacy of a private individual, in the absence of a compelling public issue, a matter of specific public interest, or an on-going news story.

The United States Constitution does not protect a media invasion of privacy where consent to media exposure is obtained by fraud. Here, the defendants' inverview of the plaintiffs was clearly obtained by fraud.

The media may not use its First Amendment rights to interfere with, or adversely affect, an individual's right to earn his living, in the absence of a matter of substantial public importance. Here, the media arbitrarily abused

plaintiffs' Constitutional right to pursue their lawful occupation by their distorted story falsely impugning plaintiffs' integrity and extolling the public to abstain from using plaintiffs' services.

The Summary Judgment in this case constituted a denial of plaintiffs' right to due process of law, inasmuch as the broadcast did not constitute protected opinion and the trial Court made no determination of any other issues of the case.

We Therefore pray that this Court issue its Writ of Certiorari to the Supreme Court of the State of California, directing that Court to reverse the Summary Judgment of this case and remand the case for trial on all causes of action of plaintiffs' Complaint on the foregoing grounds.

Jacque Boyle

JACQUE BOYLE
Attorney for Petitioners

PROOF OF SERVICE BY MAIL

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 333 South Grand Avenue, Suite 4220, Los Angeles, California 90071. On July 29, 1985 I served the within Petitioners' Reply Brief, on each of the interested parties in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

LILLICK, McHOSE & CHARLES
KENNETH E. KULZICK
AMY D. HOGUE
707 Wilshire Boulevard, 45th Floor
Los Angeles, California 90017

HONORABLE IRVING A. SHIMER
Judge of the Superior Court
111 North Hill Street
Los Angeles, CA 90012

HONORABLE THOMAS T. JOHNSON
Judge of the Superio: Court
111 North Hill Street
Los Angeles, CA 90012

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
4050 State Building
350 McAllister Street
San Francisco, CA 94102

OFFICE OF THE CLERK
COURT OF APPEAL
2nd Appellate District
3580 Wilshire Blvd., Room 301
Los Angeles, California 90010

I declare under penalty of perjury, that the foregoing is true and correct.

Executed July 29, 1985 at Los Angeles, California.

Jacque Boyle

JACQUE BOYLE, Declarant

II.

CONCLUSION

Petitioners mischaracterize the record in a colorful manner. They actively solicited publicity, consented to the interview but were unhappy with the opinions expressed. No promises were alleged or made. No facts are alleged which support any viable claim. The petition should be denied.

Respectfully submitted,

LILLICK MCHOSE & CHARLES
KENNETH E. KULZICK
AMY D. HOGUE

Attorneys for Respondents
Golden West Broadcasters,
Larry McCormick and Lew Rothbart